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No. 91-215

In The

Supreme Court of the United States

October Term, 1991

GEORGE FARIAS,

Petitioner,

vs.

BEXAR COUNTY BOARD OF TRUSTEES FOR MENTAL HEALTH MENTAL RETARDATION SERVICES, THOMAS C. LOPEZ, JOHN R. HEARD, SUE M. HALL, HOLLIS V. RUTLEDGE, IRA SMITH, JR., BOB MARTIN and DR. DAMASO A. OLIVA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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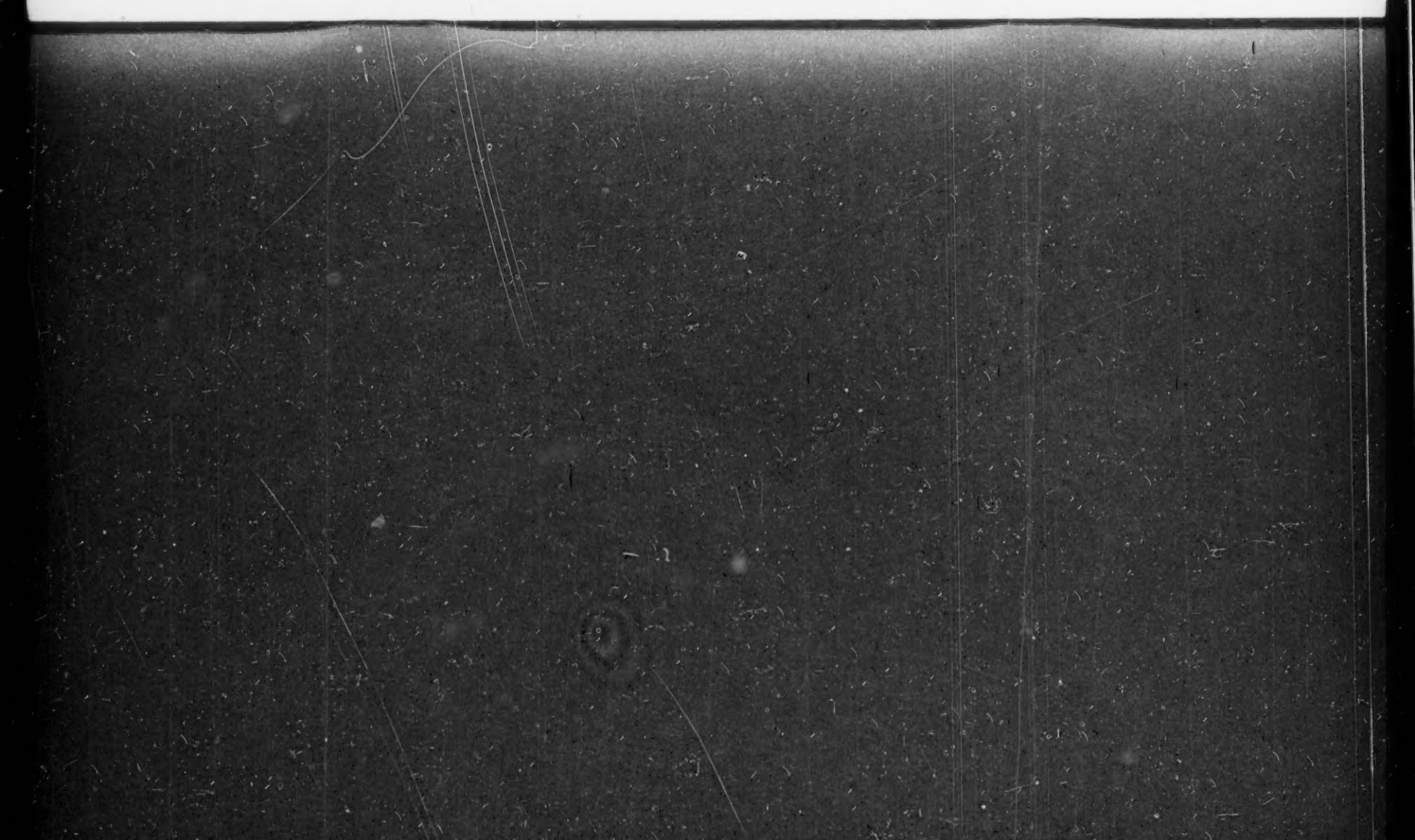

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Bexar County Board of Trustees for Mental Health Mental Retardation Services, Thomas C. Lopez, John R. Heard, Sue M. Hall, Hollis V. Rutledge, Ira Smith, Jr., Bob Martin and Dr. Damaso A. Oliva respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the opinion of the United States Court of Appeals for the Fifth Circuit

rendered on March 11, 1991. That opinion is reported at 925 F.2d 866.

STATEMENT OF THE CASE

On April 28, 1988, Petitioner filed suit against Respondents in the 57th Judicial District Court of Bexar County, Texas. The Petitioner alleged, among other causes of action, that Respondents wrongfully failed to renew his employment contract in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution, and in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000e, *et seq.* Petitioner made no demand for a jury in state court as required by Rule 216, Tex. R. Civ. P.

On May 21, 1988, Respondents filed their Petition for Removal to the United States District Court for the Western District of Texas. Formal Notice of Removal was served on Petitioner on May 23, 1988. On November 7, 1988, Petitioner served a Demand for Jury Trial or, in the Alternative, Motion for Jury Trial, over five (5) months after such a demand was required by Rule 81(c), Fed. R. Civ. P. The sole reason Petitioner offered to excuse his late demand was his deliberate decision not to request a jury until after his Motion for Remand was determined.

Both before the filing of Petitioner's Demand, and after (on September 6, 1988, and again on March 16, 1989), the District Court made docket entries setting this cause for a non-jury trial on July 17, 1989, the date this cause was called for trial. Respondents conducted all of their discovery, and prepared for trial on the basis of a

non-jury presentation. When the parties submitted their Joint Proposed Pre-Trial Order on June 15, 1989, no voir dire questions, agreement as to qualification of jurors, or jury instructions for a general charge were submitted by any party, though the District Court was advised of the pendency of Petitioner's jury demand.

Contemporaneous with the filing of the Pre-Trial Order, Respondents filed their Motion to Strike Jury Demand. In his Response to that Motion, and Brief In Support of his Response, Petitioner alleged that the Court should consider other factors, in addition to his delay in demanding a jury, such as whether the case would normally be tried to a jury, the parties' belief as to whether a bench trial had previously been set, and other matters that might demonstrate prejudice. The Court subsequently denied Petitioner's jury demand and ordered a non-jury trial.

Following entry of that Order, Petitioner filed a Motion to Reconsider, asking that the Trial Court again consider those factors. The Court denied the Motion to Reconsider.

Accordingly, the District Court exercised its discretion on two separate occasions when denying Petitioner's request for a jury under Rule 39(b). In reaching that result, the District Court, in addition to other factors it may have considered, had before it: (1) Petitioner's deliberate delay in demanding a jury trial; (2) the Court's record setting the cause for non-jury trial on two occasions; (3) the need for a bifurcated trial that would be required if the late jury demand was granted, since the Title VII issues were triable to the Court, and not a jury;

(4) the extra time consumed by a jury trial and additional expense caused the parties, together with the resulting increase in the congestion of the Court's docket if the late jury demand was granted; and (5) knowledge that the entirety of Respondents' discovery and trial preparation had proceeded on a non-jury basis.

On July 17, 1989, this cause was called for trial. Following a five-day trial to the Court, judgment was entered that Petitioner take nothing from Respondents. The Fifth Circuit Court of Appeals affirmed that judgment "in all respects." *Farias*, 925 F.2d at 880.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

Review on Writ of Certiorari is not a matter of right, but of sound judicial discretion, and is granted only when there are special or important reasons justifying that review. Sup.Ct. R. 10.1; *Fay v. Noia*, 372 U.S. 391, 436, 83 S.Ct. 822, 9 L.Ed. 2d 837 (1963). The issue raised in the Petition does not meet that criteria. No constitutional principle important to the public generally (as distinguished from the parties) is involved; nor is a substantive conflict of authority between Circuit Courts of Appeal at issue. See: *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79, 75 S.Ct. 614, 99 L.Ed. 897 (1955).

Petitioner does not challenge the District Court's judgment (reached after a five day trial and "affirmed in all respects" by the Court of Appeals) that his causes of action fail on their merits. Rather, the Petition invites this

Court to review the record of each case in which a District Court has exercised the broad discretion granted by Rule 39(b), Fed. R. Civ. P., to refuse to rescue a litigant from his waiver of a jury trial. The sole issue raised by the Petition is whether the Court of Appeals erred in holding that the District Court did not abuse its discretion in denying Petitioner's Motion for Jury Trial under Rule 39(b), Fed. R. Civ. P. See: *Moores v. Greenberg*, 834 F.2d 1105, 1109 (1st Cir. 1987); *Beckham v. Safeco Insurance Co. of America*, 691 F.2d 898, 905 (9th Cir. 1982); *Swofford v. B & W, Inc.*, 336 F.2d 406, 408 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed. 2d 557 (1965).

A. PETITIONER WAIVED HIS RIGHT TO A JURY TRIAL.

The right to a jury trial, although protected by the Seventh Amendment to the Constitution, is not absolute; it may be waived if a timely demand is not made. *U.S. v. Moore*, 340 U.S. 616, 622, 71 S.Ct. 524, 95 L.Ed. 582 (1951); *U.S. v. Missouri River Breaks Hunt Club*, 641 F.2d 689, 692 (9th Cir. 1981); *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461, 464 (6th Cir. 1988), *cert. denied*, 110 S.Ct. 75, 107 L.Ed. 2d 42 (1989). Since this action was removed from state court to a United States District Court, the provisions of Rule 81(c), Fed. R. Civ. P., determine whether Petitioner waived a jury. *Houston North Hospital Properties v. Telco Leasing, Inc.*, 688 F.2d 408, 409 (5th Cir. 1982); *Higgins v. Boeing Co.*, 526 F.2d 1004, 1006 (2d Cir. 1975). That Rule provides, in pertinent part:

> . . . a party entitled to trial by jury under Rule 38 shall be accorded it, if the party's demand therefor is served within ten (10) days after the

> petition for removal is filed if the party is the petitioner . . . *The failure of a party to make demand as directed constitutes a waiver by that party of trial by jury*. (emphasis supplied).

Notice of Removal was served on Petitioner on May 23, 1988. No demand for a jury trial was made by Petitioner until November 7, 1988 – over five (5) months after a demand was required by Rule 81(c), Fed. R. Civ. P. Petitioner's failure to make demand within the time prescribed by that Rule constitutes a waiver of his right to a jury trial. *Bush v. Allstate Insurance Co.*, 425 F.2d 393, 395-396 (5th Cir. 1970), *cert. denied*, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed. 2d 64 (1970); *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed. 2d 152 (1985).

Petitioner argues that something more than a failure to comply with the time requirements established by the Rules for making a jury demand must be shown before a waiver is established. That assertion is erroneous. Petitioner's reliance on authority announcing a presumption against jury waiver is inapposite. None of that authority concerns waiver of a jury by failing to comply with the timeliness requirements of the Federal Rules of Civil Procedure. See, e.g., *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 57 S.Ct. 809, 81 L.Ed. 1177 (1937) (whether a request for peremptory instructions constitutes a jury waiver); *Hodges v. Easton*, 106 U.S. 408, 1 S.Ct. 307, 27 L.Ed. 169 (1882) (whether a court may submit some disputed fact issues to a jury and retain others for disposition); *Dimick v. Schiedt*, 293 U.S. 474, 55 S.Ct. 296, 79 L.Ed. 603 (1935)

(whether a court may add damages in excess of a jury verdict).

Petitioner's request for a jury is governed by the provisions of the Rules requiring timely demand, or failing that, waiver. See: *U.S. v. 110 Bars of Silver*, 508 F.2d 799, 801 (5th Cir. 1975), *cert. denied*, 423 U.S. 861, 96 S.Ct. 118, 46 L.Ed 2d 89 (1975). The Federal Rules of Civil Procedure proceed on the premise that a jury trial is waived unless a timely demand is filed. *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389, 391 (2d Cir. 1983); *Washington v. New York City Board of Estimate*, 709 F.2d 792, 797 (2d Cir. 1983), *cert. denied*, 464 U.S. 1013, 104 S.Ct. 537, 78 L.Ed. 2d 717 (1983).

Petitioner's repeated use of the adjective "fundamental" as a prefix to the phrase "right to a jury trial" does not alter the result of his failure to request a jury until five months after a demand was required by Rule 81(c). "Waiver by failure to make a timely demand is complete even though it was inadvertent and unintended and regardless of the explanation or excuse." *Washington v. New York City Board of Estimate*, 709 F.2d 792, 797 (2d Cir. 1983), *cert. denied*, 464 U.S. 1013, 104 S.Ct. 537, 78 L.Ed. 2d 717 (1983); 9 C. Wright & A. Miller, Federal Practice and Procedure §2321, at 102 (1971); *Scharnhorst v. Independent School District No. 710*, 686 F.2d 637, 641 (8th Cir. 1982), *cert. denied*, 462 U.S. 1109, 103 S.Ct. 2459, 77 L.Ed. 2d 1337 (1983).

The Court of Appeals did not "assume" that Petitioner waived a jury as he complains. His waiver was self-executing and complete by definition when he failed

to make the timely demand required by Rule 81(c), Fed. R. Civ. P.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S RULE 39(b) MOTION FOR A JURY TRIAL.

Rule 39(b), Fed. R. Civ. P., permits a district court, on motion, to grant a jury trial despite the failure of a party to make a timely demand. The trial court has broad discretion under Rule 39 to determine whether to relieve a party of his waiver of a trial by jury. *Swofford v. B & W, Inc.*, 336 F.2d 406, 408 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed. 2d 557 (1965); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed. 2d 311 (1983). The discretion granted under Rule 39(b) is so broad that it would be very rare to find an abuse of discretion in either denying or granting a Rule 39(b) motion. *Moores v. Greenberg*, 834 F.2d 1105, 1109 (1st Cir. 1987). See also: *Beckham v. Safeco Insurance Company of America*, 691 F.2d 898, 905 (9th Cir. 1982); *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1029 (5th Cir. 1980).

Petitioner argues that a district court may deny a motion for jury trial under Rule 39 only if there are "strong and compelling" reasons supporting denial. However, one of those reasons, on which a district court may rest the exercise of its discretion, is the failure of a movant to offer adequate grounds for not making a timely jury demand. See: *Pierce v. Underwood*, 487 U.S. 552, 562, 108 S.Ct. 2541, 101 L.Ed. 2d 490 (1988).

The Court of Appeals found that Petitioner offered no viable excuse for not requesting a jury until over five (5) months after demand was required by Rule 81(c). In reaching that result, the Fifth Circuit followed a long line of recognized precedent holding that it is not an abuse of discretion for a trial court to deny a Rule 39(b) motion when the failure to make a timely jury demand results from the inadvertence of the moving party. "It is settled today that mere . . . inadvertence does not suffice to invoke the discretion of the Court . . . " *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d. 752, 756, n. 4 (6th Cir. 1985) (quoting 5 Moore's Federal Practice §39.09, at 39-40 (2d ed. 1984)). See also: *Scaramucci v. Dresser Industries, Inc.*, 427 F.2d 1309, 1318 (10th Cir. 1970); *Ma v. Community Bank*, 686 F.2d 459, 470 (7th Cir. 1982), *cert. denied*, 459 U.S. 962, 103 S.Ct. 287, 74 L.Ed. 2d 273 (1982); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed. 2d 311 (1983); *Blau v. Del Monte Corp.*, 748 F.2d 1348, 1357 (9th Cir. 1984), *cert. denied*, 474 U.S. 865, 106 S.Ct. 183, 88 L.Ed. 2d 152 (1985); *Noonan v. Cunard Steamship Co.*, 375 F.2d 69, 70 (2d Cir. 1967).

The Court of Appeals followed its precedent that delay in demanding a jury is considered strongly against a Rule 39 movant. *U.S. v. Lochamy*, 724 F.2d 494, 499 (5th Cir. 1984). The Fifth Circuit has always recognized that an impermissible excuse, such as inadvertent delay, justifies denial of a Rule 39(b) motion. *Bush v. Allstate Insurance Co.*, 425 F.2d 393, 396 (5th Cir. 1970), *cert. denied*, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed. 2d 64 (1970); *Mesa Petroleum Co. v. Coniglio*, 629 F.2d 1022, 1029 (5th Cir. 1980); *Rhodes v. Amarillo Hospital District*, 654 F.2d 1148, 1154 (5th Cir.

1981); *O'Malley v. U.S. Fidelity & Guaranty Co.*, 776 F.2d 494, 502 (5th Cir. 1985).

When the Court of Appeals "assumed" that Petitioner's delay in demanding a jury resulted from "mere inadvertence", it did not do so without any reason as Petitioner implies. That holding was explained by the Court, and predicated on the undisputed record that Petitioner offered no excuse for not demanding a jury, other than his deliberate decision not to comply with Rule 81(c). *Farias*, 925 F.2d at 873, n. 6.

The sole reason Petitioner offered to justify his delay was that his Motion for Remand would be inconsistent with a jury demand. As the Fifth Circuit Court of Appeals found, that argument is diametrically opposed to the plain dictate of Rule 81(c), and would render that Rule meaningless. *Farias*, 925 F.2d at 873, n. 6. The pendency of removal proceedings does not excuse the waiver of a jury. *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973); *Bush v. Allstate Insurance Co.*, 425 F.2d 393, 396 (5th Cir. 1970), *cert. denied*, 400 U.S. 833, 91 S.Ct. 64, 27 L.Ed. 2d 64 (1970). The excuse offered by Petitioner was tantamount to a deliberate decision not to make a timely jury demand and constitutes "inadvertence" sufficient for a district court to deny a Rule 39 motion in its discretion. *Id.*

Petitioner also asserts that the District Court did not consider other factors, such as whether the case involved issues best tried to a jury; whether the grant of a jury trial would disrupt the Court's schedule; or whether Respondents would have been prejudiced by the grant of a jury trial, which have also been considered in the Rule 39 context. See: *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th

Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed. 2d 311 (1983). Petitioner's assertion is an assumption not supported by the record.

In his Response and in his Brief in Support of his Response to Respondents' Motion to Strike Jury Demand, Petitioner argued that the District Court should consider all of those factors, citing *Mori v. Port Authority of New York and New Jersey*, 100 F.R.D. 810, 812-813 (S.D.N.Y. 1984). The District Court subsequently entered its Order denying Petitioner's Jury Demand and ordering a non-jury trial. Petitioner then filed his Motion for Reconsideration of that Order, again requesting that the Court consider those factors. The District Court denied Petitioner's Motion for Reconsideration.

Accordingly, on two occasions the District Court exercised its discretion and considered the factors now urged by Petitioner. The absence of specific findings is no support for Petitioner's assumption that the District Court did not consider all factors argued. The Rules of Civil Procedure do not require a district court to set out findings of fact and conclusions of law when exercising its discretionary powers under Rule 39. *Malbon v. Pennsylvania Millers Mutual Insurance Co.*, 636 F.2d 936, 941 (4th Cir. 1980). That the District Court found Petitioner's arguments unpersuasive does not mean that the Court did not consider all of the factors presented to it for review.

Petitioner also suggests, without any supporting authority, that Respondents had the burden of proof to defeat his Motion. Such a construction would render Rule 38 meaningless. If Rule 39(b) was meant to permit jury

trials whenever demanded, and in the absence of explanatory circumstances excusing a jury waiver, there would be no need for Rule 38. The movant carries the burden to support his Rule 39 motion. See: *Hernandez v. Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139, 145 (5th Cir. 1988); *Sheinfeld v. Alcorn Combustion Co.*, 41 F.R.D. 465, 466 (S.D. Tex. 1967); *Arnold v. Chicago, B. & Q.R. Co.*, 7 F.R.D. 678, 680 (D.Neb. 1947).

C. THERE IS NO SUBSTANTIVE CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL CONCERNING THE EXERCISE OF DISCRETION UNDER RULE 39(b).

Petitioner attempts to categorize Circuit Courts of Appeal by reference to different "tests" purportedly utilized when determining Rule 39 issues. These "tests" present a contrived conflict where none exists. The opinions of the various Circuits demonstrate that no fixed tests are universally applied. Rather, the Circuit Courts of Appeal employ a variety of considerations specific to the facts of each case to determine whether a District Court has abused the broad discretion granted by Rule 39.

For example, Petitioner argues that the Fifth, Seventh, Tenth, and Eleventh Circuits review a trial court's exercise of discretion under Rule 39(b) using a "strong and compelling reasons" test. However, an examination of the opinions in these Circuits demonstrates that each, depending on the circumstances specific to the case at issue, also refuses to reverse orders of the district courts denying a jury trial when the excuse offered to justify a late jury demand was the result of "mere inadvertence". See, e.g., *Fredieu v. Rowan Companies, Inc.*, 738 F.2d 651,

654 (5th Cir. 1984); *Ma v. Community Bank*, 686 F.2d 459, 470 (7th Cir. 1982), *cert. denied*, 459 U.S. 962, 103 S.Ct. 287, 74 L.Ed. 2d 273 (1982); *Scaramucci v. Dresser Industries, Inc.*, 427 F.2d 1309, 1318 (10th Cir. 1970); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 344, 78 L.Ed. 2d 311 (1983).

Petitioner complains that the Second and Eighth Circuits do not follow the test that he desires to universally impose. Both of those Circuits have refused to apply a fixed test and " . . . approach each application under Rule 39(b) with an open mind and an eye to the factual situation in the particular case . . . ". *Cascone v. Ortho Pharmaceutical Corp.*, 702 F.2d 389, 392 (2d Cir. 1983); see also: *Littlefield v. Fort Dodge Messenger*, 614 F.2d 581, 585 (8th Cir. 1980), *cert. denied*, 445 U.S. 945, 100 S.Ct. 1342, 63 L.Ed. 2d 779 (1980). That "test" is the very definition of the broad discretion granted to district courts by Rule 39.

Petitioner asserts that the Sixth Circuit has not adopted any test. However, the Sixth Circuit has determined that "inadvertence" is not sufficient, in some circumstances, to relieve a Rule 39 movant from a waiver of trial by jury. *Sewell v. Jefferson County Fiscal Court*, 863 F.2d 461, 465-466 (6th Cir. 1988), *cert. denied*, 110 S.Ct. 75, 107 L.Ed. 2d 42 (1989); *K.M.C. Co., Inc. v. Irving Trust Co.*, 757 F.2d 752, 756 n. 4 (6th Cir. 1985).

Any attempt to categorize the decisions of the Circuit Courts of Appeal by reference to purported "tests" is both fruitless and meaningless. Rule 39 provides for broad discretion in the trial court. *Moores v. Greenberg*, 834 F.2d 1105, 1109 (1st Cir. 1987); *Parrott v. Wilson*, 707 F.2d 1262, 1267 (11th Cir. 1983), *cert. denied*, 464 U.S. 936, 104

S.Ct. 344, 78 L.Ed. 2d 311 (1983). The diversity of circumstances faced by district courts when confronted with Rule 39 motions has caused each Circuit to employ a variety of considerations tailored to the specific circumstances of each case. Applying a "test" label to these considerations serves only to obscure the absence of any "bright line" rule. By definition, Rule 39 discretion militates against the application of intransigent tests. See: *Lewis v. Thigpen*, 767 F.2d 252, 257 (5th Cir. 1985). Any perceived "conflict" results from the application of different considerations to different circumstances, not from the imposition of any intractable "tests" by the Circuit Courts of Appeal.

This Court has, in analogous contexts, been reluctant to fix or narrow guidelines for district courts to follow because the number of possible situations faced by those courts is large. See, e.g., *Pierce v. Underwood*, 487 U.S. 552, 562, 108 S.Ct. 2541, 101 L.Ed. 2d 490 (1988); *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 10-11, 100 S.Ct. 1460, 64 L.Ed. 2d 1 (1980). The diffuse circumstances faced by district courts in determining Rule 39 motions argue for continued broad discretion by those Courts. *Id.*

There is no substantive conflict between the Circuit Courts of Appeal concerning review of Rule 39 motions. This Court should not impose a stringent fixed test that would impair the exercise of the broad discretion granted to district courts by that Rule, which is necessary for those Courts to effectively address the wide variety of circumstances each such motion inevitably raises.

CONCLUSION

For the reasons set forth, Respondents Bexar County Board of Trustees for Mental Health Mental Retardation Services, Thomas C. Lopez, John R. Heard, Sue M. Hall, Hollis V. Rutledge, Ira Smith, Jr., Bob Martin and Dr. Damaso A. Oliva pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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